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## Torts--Rebuttable Presumption of Child's Incapacity for Contibutory Negligence

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swimming pool. This case is cited by Dean Prosser<sup>23</sup> as an example of a court following the public invitation theory in regard to the definition of an invitee. In another case,<sup>24</sup> the West Virginia court stated that

invitation is the act of one who solicits or incites others to enter upon, remain in, or make use of, his property or structures thereon, or who so arranges the property or the means of access to it or of transit over it as to induce the reasonable belief that he expects or intends that others shall come upon it or pass over it.<sup>25</sup>

There has been no case since the adoption of the new *Restatement of Torts* definition of an invitee in which the West Virginia Supreme Court of Appeals has stated its position in regard to what constitutes an invitee. It should be pointed out, however, that even in cases in which the court has ruled that a business visitor was an invitee, it did not necessarily exclude a public invitee. There are also remarks by the court, cited above, which indicate that it does follow the public invitation test as well as the business visitor test. In light of the added impetus and credibility given to the public invitation concept of an invitee by the American Law Institute, it is possible that the West Virginia Supreme Court of Appeals may in the future formally adopt the new Restatement definition of an invitee, as did the California Supreme Court in the principal case.

*Robert Bruce King*

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### **Torts—Rebuttable Presumption of Child's Incapacity for Contributory Negligence**

*P*, a twelve year old child, rode a bicycle into an intersection and was injured when the bicycle collided with an automobile driven by *D*. In directing a verdict for *D* the trial court ruled as a matter of law that *P* was guilty of contributory negligence. *Held*, reversed for further proceedings. The contributory negligence of

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<sup>23</sup> PROSSER, *op. cit. supra* note 7.

<sup>24</sup> *Waddell v. New River Co.*, 141 W. Va. 880, 93 S.E.2d 473 (1956).

<sup>25</sup> *Id.* at 883, 93 S.E.2d at 476.

P was a jury question. The doctrine of rebuttable presumption of incapacity for contributory negligence of children between the ages of seven to fourteen is abandoned. Such children are expected to exercise the degree of care of ordinary prudent children of the same age, intelligence and experience under like or similar circumstances. *Williamson v. Garland*, 402 S.W.2d 80 (Ky. 1966).

The rebuttable presumption of incapacity for contributory negligence of children between the ages of seven and fourteen, abandoned by the Kentucky court, is identical to the rule in West Virginia, with the exception that the lower age limit of this class has not been conclusively established in West Virginia. While it is well settled in West Virginia that the rebuttable presumption of incapacity for contributory negligence exists in favor of the child under the age of fourteen,<sup>1</sup> the lower age limit has not been definitely established.

Prior to 1922 the lower age limit had been set at seven<sup>2</sup> However, in *Prunty v. Tyler Traction Co.*<sup>3</sup> the West Virginia court, by dictum, declared that a child three years and four months old may be found guilty of contributory negligence. The court in *Pierson v. Liming*<sup>4</sup> definitely abandoned the old rule which set the lower age limit at seven years, and declared that "whether a child is capable of exercising any care is determined by the consideration of its age, intelligence, experience, discretion, previous training, maturity, alertness and the nature of the danger encountered." The West Virginia court noted that this was the position taken by a majority of jurisdictions. Under this rule the lower age limit would vary in different situations.

This seemed to be a sensible rule and one easy to follow. However, four years later in *Marsh v. Riley*<sup>5</sup> the West Virginia court, by dictum, indicated that a child three years and four months old could not be guilty of contributory negligence as a matter of law. There have been no cases discovered since the *Marsh* case involving the contributory negligence of a child under the age of seven.

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<sup>1</sup> *Pierson v. Liming*, 113 W. Va. 145, 167 S.E. 131 (1932); *Prunty v. Tyler Traction Co.*, 90 W. Va. 194, 110 S.E. 570 (1922); *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S.E. 200 (1909).

<sup>2</sup> *Ewing v. Lanark*, *supra* note 1.

<sup>3</sup> 90 W. Va. 194, 110 S.E. 570 (1922).

<sup>4</sup> 113 W. Va. 145, 149, 167 S.E. 131, 134 (1932).

<sup>5</sup> 118 W. Va. 52, 188 S.E. 748 (1936); Note, 44 W. VA. L. Q. 55 (1937).

A few cases involving children over seven appear to limit the rebuttable presumption to between the ages of seven and fourteen.<sup>6</sup> The general rule set forth in *Pierson v. Liming*<sup>7</sup> has not been departed from in other subsequent cases involving children over seven.<sup>8</sup> In *Shaw v. Perfetti*,<sup>9</sup> which appears to be the latest West Virginia case in point, the court merely declared that a child between seven and eight years of age is protected by the rebuttable presumption.

Since none of the decisions subsequent to *Pierson v. Liming*<sup>10</sup> has involved children under the age of seven, the decisions which appear to limit the lower age to seven should not be authoritative.

Much of the confusion surrounding presumptions is due to the use of inaccurate terminology. A few definitions distinguishing a true rebuttable presumption from other procedural phrases sometimes called presumptions is in order before a determination can be made of the procedural effect of a presumption in West Virginia.

"A presumption is the assumption of a fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action."<sup>11</sup> The term conclusive presumption is used to describe the assumption of a fact from a basic fact where the presumed fact cannot be rebutted.<sup>12</sup> This is not a true presumption and should never be called a presumption without including the word conclusive. Another term which is sometimes called a presumption is the inference. An inference is used to describe the procedure by which the assumed fact may be presumed but the presumption is not mandatory. The rebuttable or true presumption is mandatory until certain specified conditions are fulfilled.<sup>13</sup>

The existence of the presumption will result in a peremptory ruling by the judge for the plaintiff if the defendant offers no

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<sup>6</sup> *Buckley v. Valley Camp Coal Co.*, 324 F.2d 244 (1963); *Pitzer v. M.D. Tompkins & Sons*, 136 W. Va. 268, 67 S.E.2d 437 (1951).

<sup>7</sup> 113 W. Va. 145, 167 S.E. 131 (1932).

<sup>8</sup> *Armstead v. Holbert*, 146 W. Va. 582, 122 S.E.2d 43 (1961); *Union Carbide & Carbon Corp. v. Peters*, 206 F.2d 366 (1953); *French v. Sinkford*, 132 W. Va. 66, 54 S.E. 2d 381 (1948).

<sup>9</sup> 147 W. Va. 87, 125 S.E.2d 778 (1962).

<sup>10</sup> 113 W. Va. 145, 178 S.E. 131 (1932).

<sup>11</sup> UNIFORM RULES OF EVIDENCE rule 13.

<sup>12</sup> *Morgan, Foreword*, in MODEL CODE OF EVIDENCE 52 (1942).

<sup>13</sup> *Ibid.*

evidence to rebut it. However, the effect of the presumption in situations in which the defendant does offer rebutting evidence is not clear. There are two views concerning the weight of evidence the defendant must introduce to rebut the presumption. The prevailing approach, advocated by Thayer, is that the presumption is merely a procedural device for determining who must come forward with the evidence, and loses all its effect as soon as such evidence is introduced.<sup>14</sup> The weight of evidence needed to overcome the presumption is that from which a jury could reasonably find the non-existence of the presumed fact. This view was adopted by the American Law Institute<sup>15</sup> and is supported by Wigmore.<sup>16</sup>

The contrary position is that proposed by Morgan and suggested in the Uniform Rules of Evidence.<sup>17</sup> While Thayer would have the presumption shift only the burden of producing or coming forward with the evidence, Morgan would have it shift the burden of persuasion also. The weight of evidence necessary to rebut a presumption under this view would be a preponderance of the evidence. The difference is that the presumption would still have effect after the defendant's rebutting evidence had been presented. The defendant will not prevail unless the judge is convinced that he has overcome the presumption by a preponderance of the evidence.<sup>18</sup>

In *Mulroy v. Co-Operative Transit Co.*,<sup>19</sup> the court held that a "rebuttable presumption is not evidence of a fact, but purely a conclusion, having no probative force, and designed only to sustain the burden of proof until evidence is introduced tending to overcome it." The weight of evidence necessary for rebuttal is defined as "substantial or credible." The meaning of, "substantial or credible" may be determined by considering other cases involving presumptions in West Virginia.

In *Shaw v. Perfetti*<sup>20</sup> the court held that when a presumption is

<sup>14</sup> THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW § 313 (1898).

<sup>15</sup> MODEL CODE OF EVIDENCE rule 704 (1942).

<sup>16</sup> 9 WIGMORE, EVIDENCE §§ 2485-2494 (3d ed. 1940).

<sup>17</sup> *Supra* note 12. Morgan's view is not accepted fully, but only so far as the basic facts from which the presumption is made have any probative value. See UNIFORM RULES OF EVIDENCE rule 14(a).

<sup>18</sup> Morgan, *Foreword*, in MODEL CODE OF EVIDENCE 52 (1942).

<sup>19</sup> 142 W. Va. 165, 176, 95 S.E.2d 63, 70 (1956).

<sup>20</sup> 147 W. Va. 87, 125 S.E.2d 778 (1962).

rebutted by uncontradicted evidence the presumption disappears and it no longer is a matter for jury determination. In *Dwight v. Hazlett*<sup>21</sup> the court held that a rule based on a presumption becomes impotent whenever facts to the contrary are established to rebut the presumption. In the *Dwight* case, Wigmore is cited for the proposition that no presumption will stand in the face of facts. The language of these cases indicates that the West Virginia law is in accord with the view advocated by Thayer and adopted by the American Law Institute. If West Virginia is in accord with Thayer, then the weight of evidence needed to rebut a presumption would be that from which a jury could reasonably find the non-existence of the presumed fact. This is essentially the same weight of evidence necessary to submit any question of fact to the jury.

In West Virginia, a presumption disappears from the case when evidence is introduced which rebuts it. Accordingly, it would be improper for the judge to instruct the jury regarding the presumption when such evidence is produced,<sup>22</sup> although many trial judges do instruct the jury in this situation. *Shaw v. Perfetti*<sup>23</sup> is an indication that this could be prejudicial error in a close case. This question does not appear to have been directly passed upon by the West Virginia court.

If the West Virginia court were to abandon the rebuttable presumption of incapacity in children under fourteen years of age, the decision would have very little practical effect because the weight of evidence that the defendant must produce to establish *prima facie* contributory negligence in the absence of the presumption is the same as that which would be required to overcome the presumption.

*Jerry David Hogg*

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<sup>21</sup> 107 W. Va. 192, 147 S.E. 877 (1929).

<sup>22</sup> MARSHALL, FITZHUGH & HELVIN, EVIDENCE IN VIRGINIA AND WEST VIRGINIA 215 (1954).

<sup>23</sup> 147 W. Va. 87, 125 S.E.2d 778 (1962).